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Chapter 20: Education Law

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CHAPTER 20

Education Law

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§20.1. Introduction. During the 1974 Survey year, the attention of education law practitioners as well as the public was focused on the issue of school desegregation, which "aroused passions and engaged the interest of a broad cross section of citizens."[1] This chapter will discuss these developments in school desegregation and other significant, albeit less dramatic, developments in an area of traditional concern in Massachusetts, state aid to nonpublic schools,[2] and in two areas of more recent concern, student rights[3] and maternity leave.[4] Other developments in teacher personnel administration[5] and school governance[6] will be surveyed.

§20.2. Racial balance and desegregation: The violations and scope of remedies. The nine year struggle to define the requirements of the Racial Balance Law[1] culminated during the Survey year in judicial and legislative activity at the state level which crossed the threshold from challenge to reluctant implementation of racial balance in Boston and Springfield. At the same time, judicial, and to a far lesser extent, legislative, activity at the federal level foretold a shift

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§20.1. [1] School Comm. of Springfield v. Board of Educ., 1974 Mass. Adv. Sh. 2031, 2079, 319 N.E.2d 427, 446 (addendum, Tauro, C.J.). See §§ 20.2-.4 infra.

[2] See § 20.5 infra. For prior discussions, see Levenson, Education Law, 1970 Ann. Surv. Mass. Law § 23.1, at 543; Education Law, 1969 Ann. Surv. Mass. Law § 18.1, at 460.

[3] See §§ 20.6-.7 infra. For prior discussion, see Levenson, Education Law, 1970 Ann. Surv. Mass. Law § 23.2, at 546; Comment, 1970 Ann. Surv. Mass. Law § 23.6, at 551.

[4] See § 20.9 infra.

[5] See §§ 20.8, 20.10-.11 infra.

[6] See § 20.12 infra.

§20.2. [1] The term "Racial Balance Law" shall be used to refer to G.L. c. 15, §§ 1I-1K and c. 71, §§ 37C, 37D, originally inserted by Acts of 1965, c. 641, §§ 1, 2. See Roach, Education Law, 1965 Ann. Surv. Mass. Law § 20.3, at 295. The term "New Racial Balance Law" shall be used to refer to the Racial Balance Law as amended by Acts of 1974, c. 636.

of the spotlight in Boston for subsequent years to the federal forums.

The shift in activity from the state forum to the federal highlights the distinction between the concepts of "racial imbalance" and "segregation." Activity at the state level focused on "racial imbalance," defined by the Massachusetts legislature in terms of student assignment.[2] A school is considered to be "racially imbalanced" when more than fifty per cent of the students in that school are non-white.[3] For the purpose of determining racial imbalance, classification as non-white may be made on the basis of appearance.[4] On the other hand, the federal focus was on "segregation" in violation of the Fourteenth Amendment,[5] defined by purpose or intent to discriminate.[6] For the purpose of determining whether segregated schools exist, identifiable races, national origins or ethnic minorities which suffer economic and cultural discrimination could be considered together as a single category.[7]

The significance of the different focuses employed by the state and federal forums is in the scope of the remedies available. On the state level, legislative remedial efforts were directed solely toward student assignment. The redrawing of school attendance districts was constrained by the need to bear a reasonable proximity to recognized neighborhoods and to give safety the same weight as achievement of racial balance.[8] Moreover, insofar as the duties or remedies of the Racial Balance Law were legislatively created, they were subject to possible limitation or abolition by the state legislature.[9] In federal court, however, once a purpose or intent to segregate is found, the remedies available to accomplish desegregation may be broader in scope than student assignments[10] and may include elimination of all consequences and vestiges of segregation. Furthermore, the remedies must be implemented forthwith, and are evaluated by the standard of whether they are reasonable, feasible and workable.[11] Objections to transportation of students are valid only when the time or distance of travel is so great as to either risk the health of the children or significantly im-

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[2] G.L. c. 71, § 37D, as amended by Acts of 1971, c. 958.

[3] G.L. c. 71, § 37D. Conversely, under the New Racial Balance Law, a school is "racially balanced" when more than thirty per cent but not more than fifty per cent of its students are non-white.

[4] See School Comm. of New Bedford v. Commissioner of Educ., 349 Mass. 410, 416, 208 N.E.2d 814, 818 (1965).

[5] See Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 18 (1971).

[6] See Keyes v. School Dist. No. 1, Denver, Colo., 413 U.S. 189 (1973).

[7] See id. at 197.

[8] See School Comm. of Springfield v. Board of Educ., 1972 Mass. Adv. Sh. 1543, 1562-63, 287 N.E.2d 438, 452-53 (*Springfield I*).

[9] See § 20.3 infra.

[10] Desegregation pursuant to the Fourteenth Amendment, however, does not require racial balance. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 17-18 (1971). See 42 U.S.C. §§ 2000c, 2000(c)(6); 20 U.S.C. §§ 1651, 1656; and Pub. L. No. 93-380, §§ 205, 251 (Aug. 21, 1974).

[11] See Green v. County School Bd., 391 U.S. 430 (1968).

pinge on the educational process.[12] As a practical matter, individuals or groups seeking legal relief from a busing plan to promote desegregation usually have been unsuccessful.[13]

§20.3. Racial balance. Following an unsuccessful challenge in 1967 to the constitutionality of the Racial Balance Law by the Boston School Committee,[1] state court proceedings concerning the Racial Balance Law prior to the 1974 Survey year generally concerned the procedural format established by the Law[2] and a collateral attempt to limit the Law's impact.[3]

In both *Springfield I*[4] and *Boston I*,[5] the school committees of Springfield and Boston challenged the 1971 actions of the state Board of Education in withholding state school funds from the committees under the Racial Balance Law. In holding that the withholding of funds by the Board was not justified, the Supreme Judicial Court pointed out that three conditions must be met before the sanctions contained in the Racial Balance Law could be invoked by the Board. First, the Board must find that progress within a reasonable time toward implementation of an approved plan was not being made.[6] Second, the Board had a statutory obligation to provide technical assistance to a school committee in formulating a plan.[7] And, third, the school committee had to reject specific recommendations made by the Board for a plan, or, after specific recommendations had been made by the Board, the school committee had to submit a revised plan

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[12] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 31 (1971).

[13] For a compendium of cases challenging busing orders, see Annot., Relief Against School Board's "Busing" Plan to Promote Desegregation, 50 A.L.R.3d 1089.

§20.3. [1] School Comm. of Boston v. Board of Educ., 352 Mass. 693, 227 N.E.2d 729 (1967), appeal dismissed, 389 U.S. 572 (1968).

[2] For a case prior to the 1974 Survey year concerning Springfield, see School Comm. of Springfield v. Board of Educ., 1972 Mass. Adv. Sh. 1543, 287 N.E.2d 438 (*Springfield I*). For such cases prior to the 1974 Survey year concerning Boston, see School Comm. of Boston v. Board of Educ., 1973 Mass. Adv. Sh. 161, 292 N.E.2d 338 (*Boston I*); School Comm. of Boston v. Board of Educ., 1973 Mass. Adv. Sh. 275, 292 N.E.2d 870 (*Boston II*).

[3] Opinion of the Justices, 1973 Mass. Adv. Sh. 1027, 298 N.E.2d 840 (bill prohibiting transportation of students without parental consent and giving each child through his parent the absolute right to attend the school nearest his home that has an available seat held unconstitutional).

[4] School Comm. of Springfield v. Board of Educ., 1972 Mass. Adv. Sh. 1543, 287 N.E.2d 438.

[5] School Comm. of Boston v. Board of Educ., 1973 Mass. Adv. Sh. 161, 292 N.E.2d 338.

[6] *Springfield I*, 1972 Mass. Adv. Sh. at 1556, 287 N.E.2d at 450-51; *Boston I*, 1973 Mass. Adv. Sh. at 167, 292 N.E.2d at 343-44.

[7] *Springfield I*, 1972 Mass. Adv. Sh. at 1557-58, 287 N.E.2d at 451; *Boston I*, 1973 Mass. Adv. Sh. at 170, 292 N.E.2d at 345.

which was rejected by the Board.[8] Although the school committees of both Springfield and Boston were thus considered to be in literal—if less than enthusiastic—compliance with the Racial Balance Law, the Court exercised its equity power in directing the superior court to establish schedules for the filing of short-term plans for both localities.[9] Subsequently, short-term plans were submitted by the Boston and Springfield school committees,[10] but were rejected following hearings by the Board of Education[11] as not satisfying the criteria of the Law.[12] Thus, after eight years of continuous activity and vigorous debate, the substantive issues involved in the Board of Education's determination to reject a plan developed by a local school committee and to recommend a specific plan as a means of achieving racial balance were first properly presented to the Supreme Judicial Court on bills for judicial review in the 1974 Survey year.

In *Boston III*,[13] the Supreme Judicial Court considered the school committee's challenge to the Board plan developed as a result of administrative hearings held by the Board of Education before a hearing examiner, Professor Louis Jaffe, between March and May, 1973. The school committee disputed the proper scope of the hearings, the evidentiary basis for the factual assumptions of the school committee's plan, and various aspects of the Board's plan. The school committee contended that, in accordance with the Court's order for the Board to develop an administrative record in *Boston II*,[14] the hearings should have been limited to the propriety of the Board's rejection in November 1972 of the school committee's original plan based only on the evidence before it at that time, and that the Board should have established the basis of its decision that the committee's factual determinations were not supported by substantial evidence.[15] Rejecting the

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[8] *Springfield I*, 1972 Mass. Adv. Sh. at 1559, 287 N.E.2d at 452; *Boston I*, 1973 Mass. Adv. Sh. at 169, 292 N.E.2d at 344-45. In *Boston II*, 1973 Mass. Adv. Sh. 275, 292 N.E.2d 870, the Court established that the Board's determination must be based on an administrative record established at a hearing which would subsequently serve as the basis for judicial review. Id. at 277-78, 292 N.E.2d at 873.

[9] *Springfield I*, 1972 Mass. Adv. Sh. at 1556, 287 N.E.2d at 456-57; *Boston I*, 1973 Mass. Adv. Sh. at 172-73, 292 N.E.2d at 347.

[10] The Springfield plan was transmitted without the approval of the School Committee.

[11] The Boston plan was initially rejected by the Board in the absence of an administrative record. In *Boston II*, 1973 Mass. Adv. Sh. at 277-78, 292 N.E.2d at 873, the matter was remanded to the Board of Education for hearings and the establishment of an administrative record.

[12] *Springfield II*, 1974 Mass. Adv. Sh. 657, 663-65, 311 N.E.2d 69, 72-73; *Boston III*, 1973 Mass. Adv. Sh. 1315, 1316, 302 N.E.2d 916, 918-19.

[13] School Comm. of Boston v. Board of Educ., 1973 Mass. Adv. Sh. 1315, 302 N.E.2d 916.

[14] School Comm. of Boston v. Board of Educ., 1973 Mass. Adv. Sh. 275, 278-81, 292 N.E.2d 870, 873-74.

[15] *Boston III*, 1973 Mass. Adv. Sh. at 1319, 302 N.E.2d at 920.

contentions of the committee, the Supreme Judicial Court stated that the hearings ordered in *Boston II* were intended as a "vehicle for action" rather than as an explanation for past decisions.[16] The Court stated that a factual investigation by the Board would have served no purpose since the school committee's plan failed to provide for the redistricting necessary to alleviate racial imbalance.[17] The school committee also had charged that the Board's own plan was defective in not considering safety on an equal basis with relieving imbalance; in providing for large, gerrymandered districts; in failing to hold public hearings before districts were changed; and in disregarding educational concerns.[18] Applying the limited scope of review traditionally accorded the decisions of administrative agencies, the Court affirmed the Board's plans as based on substantial evidence and not arbitrary, capricious, or based upon errors of law.[19]

> [I]t is not our function to judge the particular merits or faults of a plan. . . . If the Committee sincerely desires the correction of perceived defects its task is not one of litigation but of consultation and persuasion.[20]

The Opinion and Order of the Board of Education was affirmed, paving the way for implementation of the Racial Balance Law in the Boston public schools in September 1974.[21]

In an effort to forestall the reassignment of students in accordance with the Racial Balance Plan, a home rule petition was addressed to the Massachusetts legislature by the city of Boston providing that the authority of the school committee to assign students based on race, sex or creed without the consent of the student's parent or guardian be conditioned on the results of a referendum in Boston.[22] In *Opinion of the Justices to the Lieutenant Governor,*[23] the Supreme Judicial Court held that the petition would significantly encourage and involve the state in racial discrimination and, if enacted, would violate the Fourteenth Amendment to the United States Constitution and Articles I and X of the Declaration of Rights of the Massachusetts Con-

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[16] Id.

[17] Id. at 1320, 302 N.E.2d at 920-21.

[18] Id. at 1322-26, 302 N.E.2d at 921-23.

[19] Id.

[20] Id.

[21] An order of the Board on Dec. 26, 1974 established a timetable to insure implementation in September 1974. In January and March 1974, the Board filed petitions seeking judicial enforcement of its order. Orders requiring compliance with various aspects of the Board's order were entered by a single justice of the Supreme Judicial Court in January and April 1974.

[22] Opinion of the Justices, 1974 Mass. Adv. Sh. 545, 548, 310 N.E.2d 348, 350.

[23] 1974 Mass. Adv. Sh. 545, 310 N.E.2d 348.

stitution.[24] The bill " 'does far more than repeal sub silentio effective enforcement of the racial imbalance law.' . . . Instead, by barring assignment of pupils on the basis of race, the bill would ensure the perpetuation of presently existing racial imbalance in Boston's schools."[25]

In *Springfield II*,[26] the Supreme Judicial Court considered that school committee's challenge to the Board plan developed for Springfield following administrative hearings held by the Board of Education before a hearing examiner in August 1973.[27] As in the Boston proceedings, the Springfield school committee maintained that the Board's own plan was flawed in not meeting safety and neighborhood requirements,[28] and that the Board did not establish an adequate basis for rejection of the committee plan, did not provide technical assistance to the committee, and prematurely conducted a hearing prior to the consideration by the committee of specific recommendations made by the Board for a revised plan.[29] An intervenor in the administrative proceedings, the Quality Integrated Education Committee, challenged the Board plan as enforcing ethnic segregation of Puerto Rican students in certain Springfield schools.[30] The Supreme Judicial Court rejected the challenges of the local school committee, and held that segregative intent with regard to Puerto Rican students, necessary to establish a violation of constitutional rights, was not established by the record.[31] The Board's Opinion and Order was affirmed; jurisdiction was retained in a single justice to insure implementation by September 1974.[32]

The status of the implementation of the racial balance plans under the Supreme Judicial Court's orders was cast into doubt on July 26, 1974, however, by the amendments to the Racial Balance Law effected by chapter 636 of the Acts of 1974.[33] The New Racial Balance

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[24] Id. at 549-50, 310 N.E.2d at 352. The effect of state encouragement of discrimination was not dependent on a finding of pre-existing segregation. See Lee v. Nyquist, 318 F. Supp. 710 (W.D.N.Y. 1970), aff'd mem., 402 U.S. 935 (1971).

[25] 1974 Mass. Adv. Sh. at 548-49, 310 N.E.2d at 351. The Court found the home rule petition to be "virtually indistinguishable" from a bill held unconstitutional in the previous year which purported to bar the transportation without parental consent of schoolchildren to or from any public school. See note 3 supra.

[26] School Comm. of Springfield v. Board of Educ., 1974 Mass. Adv. Sh. 657, 311 N.E.2d 69.

[27] The Board had approved, with slight modifications, the state Task Force on Racial Imbalance plan recommended by the hearing examiner. Id. at 660, 311 N.E.2d at 72-73.

[28] Id. at 661-62, 311 N.E.2d at 73-74.

[29] Id. at 664-67, 311 N.E.2d at 75-77.

[30] Id. at 669-70, 311 N.E.2d at 77-78.

[31] Id. at 675, 311 N.E.2d at 81.

[32] Id.

[33] On April 29, 1974, the General Court had passed a bill, vetoed by the Governor, repealing the Racial Balance Law.

Law required submission of a plan by a local school committee only if a request for a transfer of a non-white student at a racially imbalanced school to a racially isolated school[34] or of a white student at a racially isolated school to a racially imbalanced school was submitted to a school committee and could not be satisfied.[35] Most significantly, if the Board of Education were unable to approve a plan submitted by a local school committee, the Board was empowered to devise a plan but was restricted to specific methods for alleviating racial imbalance: additions to existing school buildings, use of leased or portable facilities, and changes in use of school buildings.[36]

Alleging that chapter 636 had eliminated the legal basis for the Board's order affirmed by the Supreme Judicial Court in *Springfield II*, the school committee of Springfield moved to vacate the final decree of the Court requiring implementation of racial balance in September 1974.[37] The Board of Education, represented by the office of the Attorney General, joined the school committee in its support of vacating the court orders; the motion to vacate was opposed by an intervening group of children and parents. Involved in the motion to vacate were the questions of whether chapter 636 of the Acts of 1974 was to be afforded retrospective application and, if so construed, whether chapter 636 would perpetuate segregation in violation of the Fourteenth Amendment. With the opening of schools imminent, an order without an accompanying opinion was entered by the Supreme Judicial Court on August 22, 1974, denying the school committee's motion to vacate, and reaffirming the Court's orders that a racial balance plan be implemented in Springfield in September 1974.[38]

§20.4. Desegregation. A complaint filed in 1972 by black chil-

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[34] A racially isolated school was defined as not having more than thirty per cent non-white pupils. G.L. c. 71, § 37D, as amended by Acts of 1974, c. 636, § 5.

[35] G.L. c. 71, § 37D, as amended by Acts of 1974, c. 636, § 5.

[36] G.L. c. 15, § 1I, as amended by Acts of 1974, c. 636, § 1.

[37] Implementation of the Racial Balance plan in Boston subsequent to June 21, 1974, was incorporated in the Interlocutory Order of the United States District Court in Morgan v. Hennigan, 379 F. Supp. 410 (D. Mass. 1974). See § 20.4 infra.

[38] The reasons underlying the order were stated subsequent to the 1974 Survey year in School Comm. of Springfield v. Board of Educ., 1974 Mass. Adv. Sh. 2031, 319 N.E.2d 427 (*Springfield III*) (holding that c. 636 of the Acts of 1974 would be unconstitutional if interpreted to impede achievement of racial balance in a city subject to a court order that a racial balance plan be implemented). The Supreme Judicial Court noted that "[I]n spite of the sharply divergent views . . . the responsible and cooperative efforts of all parties have resulted in an orderly and successful implementation of this court's order in the Springfield public schools." Id. at 2032 n.3, 319 N.E.2d at 429 n.3.

The Supreme Judicial Court did not address the question if the amendments effected by chapter 636 of the Acts of 1974 involved the state in racial discrimination with regard to localities not subject to existing court orders to implement a plan under the provisions of the Racial Balance Law prior to the 1974 amendments. See id. at 2055-57, 319 N.E.2d at 438.

dren attending Boston public schools[1] and their parents alleging that black students were denied both equal protection of the laws and equality of educational opportunities[2] culminated on June 21, 1974 in the decision of the United States District Court for the District of Massachusetts in *Morgan v. Hennigan*.[3]

The proceedings in *Morgan* examined six principal areas of operation within the Boston public schools: (1) facilities utilization and new structures, (2) districting and redistricting, (3) feeder patterns, (4) open enrollment and controlled transfer, (5) faculty and staff, and (6) vocational and examination schools.[4] The thrust of the Boston School Committee's position was that neighborhood schools were not unconstitutional even though they contained, as a result of residential segregation, racially imbalanced student bodies,[5] and that racially motivated discriminatory intent could not be presumed as in the case of a school system which originally had been a dual system compelled by state law. Rejecting the defense of a neighborhood school policy as "mere assertions,"[6] the court found the school committee[7] to have manipulated the neighborhood school concept with the intent of perpetuating racial discrimination.[8]

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§20.4. [1] The city of Springfield had been the subject of a suit instituted in 1964 which was dismissed without prejudice to institute a new action in the event of change in circumstance. Springfield School Comm. v. Barksdale, 348 F.2d 261 (1st Cir. 1965).

[2] Violations of the Thirteenth and Fourteenth Amendments and of 42 U.S.C. §§ 1981, 1983 and 2000d were alleged. Morgan v. Hennigan, 379 F. Supp. 410, 415 (D. Mass. 1974).

[3] 379 F. Supp. 410 (D. Mass. 1974) (Garrity, J.), *Morgan* was affirmed subsequent to the 1974 Survey year sub. nom. Morgan v. Kerrigan, 509 F.2d 580 (1st Cir. 1974).

[4] 379 F. Supp. at 425-69.

[5] Id. at 469-70.

[6] Id. at 474, citing Keyes v. School Dist. No. 1, Denver, Colo., 413 U.S. 189, 212 (1973).

[7] The Massachusetts Board of Education, also named as a defendant in the proceedings, was found free of liability for racial segregation in the Boston schools, but was retained as party defendant for the purposes of remedy. 379 F. Supp. at 477.

[8] In a federal administrative compliance proceeding initiated by the Department of Health, Education and Welfare pursuant to 42 U.S.C. § 2000d-1, discrimination had been found to exist in the Boston public schools (excluding the East Boston and Charlestown schools as geographically distinct), except for its bilingual education program, in March 1973. In April 1974, the HEW reviewing authority filed a Final Decision, affirming all material aspects of the Initial Decision, but remanding the matter to the administrative law judge for further findings as to the relationship between the use of federal funds and the particular educational programs found to be discriminatory. In re Boston Public Schools, April 19, 1974. See Board of Pub. Instruction v. Finch, 414 F.2d 1068 (6th Cir. 1969). After further hearings, the administrative law judge on July 25, 1974 found that federal programs were administered in a discriminatory manner.

Subsequent to the 1974 Survey year, the administrative proceedings were dismissed on November 19, 1974 by the HEW Reviewing Authority as a result of compliance by the Boston School Committee with Title VI of the Civil Rights Act of 1964 and with 45 C.F.R. 80.

Apart from the question of the sufficiency of evidence to support the court's findings, the opinion imposing liability in *Morgan* raises questions primarily of the separability of the district and of the application of the burden-shifting principle enunciated in *Keyes v. School Dist. No. 1, Denver, Colo.*[9] *Keyes* permitted a school district to prove that part of the district may be geographically separate, identifiable and unrelated to the rest of the system.[10] The court in *Morgan* noted Charlestown and East Boston, in particular, to be fairly intact communities separated from the rest of Boston by an inner harbor,[11] but found that the schools of Charlestown and East Boston had not been operated as a distinct subsystem within the public schools.[12] Although the schools had not been labelled or considered as a subsystem, geographic isolation makes it unlikely that a truly neutral basis of student assignment would have resulted in student assignment within the Charlestown and East Boston schools reflecting the 2 white to 1 black racial composition applicable to the city as a whole.[13] Thus, application of city-wide remedial guidelines without modification would appear to go beyond a design "to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct."[14]

Keyes further established that a finding of intentionally discriminatory school board action in a meaningful portion of the school system shifted to the school system the burden of proving that other segregated schools within the system were not also the results of intentionally segregative actions.[15] Having found the examination and vocational school programs to be segregated, the court in *Morgan* applied the burden-shifting principle to conclude that the school committee had acted with segregative intent with regard to such schools.[16] Although the *Keyes* presumption was developed in the context of geographically separate portions of a school system rather than in the context of programmatically separate portions, the extension of the presumption—and of a remedy—to an upper-grade programmatic component would appear appropriate since the programmatic com-

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[9] 413 U.S. 189 (1973).

[10] Id. at 203.

[11] 379 F. Supp. at 474.

[12] Id. at 475-76. Compare Initial Decision of the Administrative Law Judge, March 2, 1973, at 14, discussed at note 8 supra.

[13] See 379 F. Supp. at 483.

[14] Milliken v. Bradley, 418 U.S. 717, 746 (1974). The uncertain dynamics of the interrelationship between racial composition of neighborhoods and schools, however, makes it difficult to posit school composition based on existent data of neighborhood development. See 379 F. Supp. at 470-71.

[15] 413 U.S. at 208.

[16] 379 F. Supp. at 481. In this respect, the First Circuit went beyond the district court in finding strong evidence that segregation of examination schools, trade schools, and vocational programs was intentional. Morgan v. Kerrigan, 509 F.2d 580, 593-95 (1st Cir. 1974).

ponent would reflect the segregative effect of the feeder grades.

The opinion in *Morgan* concerned only the issue of liability and left the formulation of a desegregation plan to future proceedings.[17] The possibility that such plan would include a metropolitan-wide multi-district remedy, as suggested by the school committee in the initial stages of the proceedings,[18] was virtually foreclosed shortly after issuance of the *Morgan* opinion, however, by the decision of the United States Supreme Court in *Milliken v. Bradley.*[19]

Milliken considered the authority of a federal court to order the submission of a desegregation plan for a three-county metropolitan area in regard to a claim of segregation in Detroit public schools. The district court in *Milliken* had based a finding of unconstitutional discrimination on a pattern of official action by Detroit school officials, independent action by state officials, and vicarious liability of the state officers for actions of the Detroit board.[20] In reversing the order for submission of an inter-district plan, the Court held that multi-district remedies could not be required absent proof that discriminatory acts of one or more school districts or of state officials[21] substantially caused inter-district segregation.[22] The Court's holding may be read to affirm the suggestion of *Keyes*[23] that only de jure segregation justifies relief. Only if de jure segregation is found will the court proceed to the inquiry into whether the schools in the system are to be desegregated root and branch and whether racially identifiable schools

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[17] The racial balance plan, which had been developed under the Racial Balance Law, prior to the amendments effected by chapter 636 of the Acts of 1974, and had been affirmed by the Supreme Judicial Court in *Boston III,* 1973 Mass. Adv. Sh. 1315, 302 N.E.2d 916, was adopted by the court as a short-term remedy for violation of the Fourteenth Amendment to the United States Constitution. 379 F. Supp. at 484. Compare § 20.2 at note 10 supra. A desegregation plan to be issued pursuant to the remedy phase of *Morgan* will supercede implementation of the racial balance plan. It is possible, however, that several Boston schools may remain or become majority non-white—and hence racially imbalanced—subsequent to implementation of a desegregation plan. See generally § 20.2 supra. Compare Green v. County School Bd., 391 U.S. 430 (1968) (57% black, 43% white); Wright v. Council of Emporia, 407 U.S. 451 (1972) (66% black, 34% white); United States v. Scotland Neck Bd. of Educ., 407 U.S. 484, 491 n.5 (1972) (77% black, 22% white).

[18] The court denied a motion of the school committee to join numerous cities and towns around Boston as defendants, partly on the ground that the suburban municipalities had not been charged by the plaintiffs with violation of their constitutional rights. 379 F. Supp. at 416.

[19] 418 U.S. 717 (1974).

[20] Bradley v. Milliken, 338 F. Supp. 582, 587-89, 593-94 (E.D. Mich. 1971).

[21] Action by state officials, either through vicarious liability or direct action, was not sufficiently shown to have had a cross-district segregative effect. Therefore, any relief against the state officials was limited to the school district affected by segregation. 418 U.S. at 744-45.

[22] Id.

[23] 413 U.S. 189 (1973). But see id. at 214 n.18.

are otherwise justified.[24]

Although *Milliken*, therefore, clearly limits the availability of multi-district relief, the decision left open the possibility that a multi-district remedy would be proper where: (1) wrongful acts of the state or of each school district caused inter-district segregation,[25] or (2) wrongful acts of the state or of each school district caused segregation in another district,[26] and where the school districts were allowed to be heard on the issues of multi-district liability and remedy.

Even had the Court in *Milliken* affirmed the propriety of a multi-district remedy for Detroit,[27] factual differences between Detroit and Boston would have made doubtful the imposition of a metropolitan remedy in *Morgan*. First, Detroit was 63.6% black and 34.8% white while the black population of the Boston schools hovers around 35%. Therefore, the concern that a desegregated Detroit school system would remain identifiably black is not transferable to Boston. Second, state officials in Detroit were found to have contributed to segregation, while the court in *Morgan* found the state defendants to be free of liability.[28] Similarly, the authority of Michigan state officials over local school boards warranting the imposition of vicarious liability appears to be greater than the authority of the Massachusetts Board of Education over local school committees.[29]

The criteria imposed in *Milliken*, however, will further present difficulties to parties seeking a multi-district school system in Boston.[30]

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[24] See Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 26 (1971).

[25] 418 U.S. at 745. See, e.g., Haney v. County Bd. of Educ., 429 F.2d 364 (8th Cir. 1969); United States v. Texas, 321 F. Supp. 1043 (E.D. Tex. 1970), aff'd, 447 F.2d 441 (5th Cir. 1971), cert. denied, 404 U.S. 1016 (1972).

[26] 418 U.S. at 745.

[27] Justice Douglas, in a separate dissent, argued that de facto segregation in metropolitan areas justifies a metropolitan remedy. 418 U.S. at 761-62. Justice White, joined in dissent by Justices Marshall, Douglas and Brennan, found, inter alia, the acts of the state sufficient to cause interdistrict segregation. Id. at 763.

[28] 379 F. Supp. at 476-77. *Morgan* did not consider any possible constitutional violation on the part of the state with regard to municipalities not subject to court orders to implement racial balance plans arising out of enervation of the Racial Balance Law by chapter 636 of the Acts of 1974. In the event that such amendment may be found unconstitutional, however, the remedy would most likely be limited to restoration of the right (the Racial Balance Law) as existent before the violation (the amendment).

[29] Compare 418 U.S. at 726 n.5 with 379 F. Supp. at 322. See Bradley v. School Bd., 462 F.2d 1058 (4th Cir. 1972), aff'd by an equally divided Court, 412 U.S. 92 (1973) (lack of state control over Virginia local board).

[30] From the perspective of social policy, much of the support for a multi-district school system has derived from the desirability of alleviating the fiscal overburden inner cities face which result from greater costs of municipal services. See 418 U.S. at 760 n.12 (Douglas, J., dissenting). A multi-district school system would have this effect, however, only if the core city were relieved of financial responsibility for tuition of its population assigned as students to suburban schools. Compare G.L. c. 76, § 12 with G.L. c. 76, § 12A (METCO).

The drawing or redrawing of school district lines or the transfer of school units between districts to maintain separation of races[31] has not occurred in metropolitan Boston. Proof of purposeful, racially discriminatory use of state housing or zoning laws, which may make restructuring of district lines appropriate,[32] will similarly be difficult to show. Although the Boston inner city and suburban areas may be shown to be de facto segregated,[33] discriminatory use of state housing or zoning laws on racial rather than economic grounds must be demonstrated.[34]

In legislative action, the Congress affirmed the policy of the United States to provide equal educational opportunity while specifying appropriate remedies for elimination of a dual school system in the Equal Education Opportunity Act of 1974.[35] The Act's essential features specify that a federal court or administrative agency shall impose the least restrictive measures, in the context of preserving neighborhood schools, necessary to remedy denial of equal educational opportunity or equal protection of the laws.[36] The Act further states that the power of a federal court or administrative agency shall not be used for the purpose of achieving a balance among students with regard to race, sex, religion or socio-economic status.[37]

Although the Act was perceived popularly—and was presented to constituents by Congressmen—as raising the issue of the scope of constitutionally permissible limitations on the power of the federal district courts,[38] the Act explicitly provides that it is "not intended to modify or diminish the authority of the courts of the United States to enforce fully the fifth and fourteenth amendments to the Constitution of the United States."[39]

Similarly, although the Act was greeted as an "anti-busing amendment," it does not present a potential bar to implementation of a busing plan ordered by a federal court as a remedy to a finding of de jure segregation. The prohibitions against assignment or transporta-

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[31] See 418 U.S. at 753-57 (Stewart, J., concurring).

[32] Id.

[33] See Route 128, Report of the Massachusetts Commission Against Discrimination 1974.

[34] Experience with the Anti-Snob Zoning Law has evidenced lack of acceptance by the suburbs even where proposed low-income units were to be occupied by low-income whites. See James v. Valtierra, 402 U.S. 137 (1971) (discrimination on economic basis not invidious).

[35] Pub. L. No. 93-380, §§ 201-59 (Aug. 21, 1974).

[36] Id. §§ 214, 256.

[37] Id. §§ 251-53.

[38] See generally the dialogue on the power of Congress to curtail the courts in H. Hart & H. Wechsler, The Federal Courts and the Federal System 319-40 (1953). See also Medley v. School Bd., 350 F. Supp. 34 (W.D. Va. 1972), remanded on other grounds, 482 F.2d 1061 (4th Cir. 1973).

[39] Pub. L. No. 93-380, § 203(b) (Aug. 21, 1974).

tion of students prohibit only assignment for the purpose of overcoming racial imbalance, which was prohibited prior to the Act both by operation of constitutional law and by statute.[40]

§20.5. State aid to nonpublic school pupils: Textbook loan law. In contrast to the numerous publicized but unsuccessful attempts of the General Court in past years to enact legislation providing financial relief to parochial schools,[1] a textbook loan measure was enacted unheralded in the final days of the 1973 legislative session.[2] Section 48 of chapter 71 of the General Laws was amended[3] to require that a school committee, upon the individual request of a pupil in a private school approved under chapter 76, section 1 of the General Laws, lend to the pupil free of charge the same textbooks as are used in the public school.[4]

The Massachusetts textbook loan statute appears to conform to the Establishment and Free Exercise Clauses of the First Amendment to the United States Constitution.[5] In its struggle to chart a course between those two clauses in a manner "productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference,"[6] the United States Supreme Court has articulated a three-part test governing challenges to a statute as violative of the First Amendment. First, the statute must have a secular legislative purpose;[7] second, its principal or primary effect must be one that neither advances nor inhibits religion;[8] third, the statute must not foster an excessive entanglement with religion.[9] In a trilogy of cases decided during 1973,[10] the United States Supreme Court applied this three-part test to invalidate reimbursement of costs to pri-

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[40] See § 20.2 at note 10 supra. 20 U.S.C. § 1653, a precursor to Pub. L. No. 93-380, § 253, was held not to require a stay of school desegregation orders requiring busing entered to accomplish desegregation of a school system and not for the purpose of achieving a racial balance. Drummond v. Acree, 409 U.S. 1228 (1972); NAACP v. Lansing Bd. of Education., 485 F.2d 569 (6th Cir. 1973).

§20.5. [1] See Levenson, Education Law, 1970 Ann. Surv. Mass. Law § 23.1, at 543; Education Law, 1969 Ann. Surv. Mass. Law § 18.1, at 460.

[2] Acts of 1973, c. 1196, amending G.L. c. 71, § 48.

[3] G.L. c. 71, § 48, as amended by Acts of 1973, c. 1196.

[4] Companion legislation provided for physical examinations by a school committee or municipal board of health of a private school pupil at the individual request of a parent or guardian. Acts of 1973, c. 1197, amending G.L. c. 71, § 57.

[5] The First Amendment provides, in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. amend. I.

[6] Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970).

[7] Abington Township v. Schempp, 374 U.S. 203, 222 (1963).

[8] Id.

[9] Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970).

[10] Levitt v. Committee for Pub. Educ., 413 U.S. 472 (1973); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973); Sloan v. Lemon, 413 U.S. 825 (1973).

vate schools, rather than to students,[11] and to invalidate benefits provided to private school students as a delineated class, rather than benefits provided in common to all students.[12] The Religion Clauses have permitted, however, state extension of secular benefits to all children without regard to their religious affiliation, despite the fact that indirect or incidental benefit may flow to sectarian schools.[13] Relying on the "child benefit" theory, the Supreme Court in *Board of Education v. Allen*[14] held that a textbook loan program similar in all material aspects to the recently enacted Massachusetts statute did not violate the First Amendment.[15]

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[11] Levitt v. Committee for Pub. Educ., 413 U.S. 472 (1973) (New York law provided for reimbursement of nonpublic schools for expenses of services for examination and inspection in connection with administration, grading and compiling and reporting the results of tests and examinations and the maintenance of certain records); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973) (New York financial aid programs for nonpublic elementary and secondary schools provided for direct money grants to be used for maintenance and repair of facilities and equipment, established a tuition reimbursement plan for parents of children attending nonpublic elementary or secondary schools, and entitled taxpayer-parents to a deduction for each child attending nonpublic school). See also Public Funds for Pub. Schools v. Marburger, 358 F. Supp. 29 (D.N.J. 1973), aff'd, 417 U.S. 961 (1974) (New Jersey law provided for aid to parents of nonpublic school students as reimbursement for the cost of secular, nonideological textbooks, instructional materials and supplies and aid to nonpublic schools to acquire secular supplies, equipment and auxiliary services).

[12] Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973); Sloan v. Lemon, 413 U.S. 825 (1973) (Pennsylvania law provided for reimbursement of tuition paid by parents of children attending nonpublic schools).

[13] Board of Educ. v. Allen, 392 U.S. 236 (1968); Everson v. Board of Educ., 330 U.S. 1 (1947). Cf. Cochran v. Louisiana State Bd. of Educ., 281 U.S. 370 (1970). Although the decisions in both *Everson* and *Allen* predated the Supreme Court's articulation in Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970), of the entanglement criterion, extension of secular benefits to all children has been considered in dicta subsequent to *Walz* to be in conformity with the entanglement test. See Wheeler v. Barrera, 417 U.S. 402 (1974); Norwood v. Harrison, 413 U.S. 455 (1973).

[14] 392 U.S. 236 (1968).

[15] The New York statute at issue in *Allen* provided that local school boards were required to purchase secular textbooks designated for use in the schools under their charge and lend them upon individual request "to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law." Id. at 239-40 n.3.

Allen was specifically reaffirmed in Norwood v. Harrison, 413 U.S. 455 (1973). In *Norwood*, the Court held, pursuant to the stringent standard for determining what constitutes state aid to a school in the context of the Equal Protection Clause of the Fourteenth Amendment, that textbooks, a basic educational tool, are not legally distinguishable from tuition grants, and are to be distinguished from generalized services government might provide to schools in common with others. Noting that the transcendent value of free religious exercise in our constitutional scheme leaves room for "play in the joints" which is not applicable to racial discrimination, the Court in *Norwood* specifically reaffirmed *Allen*. Id. at 468-70. Pursuant to *Norwood*, pupils enrolled in private schools which discriminate on the basis of race would not be entitled to the textbook loan benefits of chapter 1196.

The Massachusetts statute[16] raises an issue of First Amendment dimensions only with regard to its potential ambiguity in defining the benefited population as "a pupil in a private school which has been approved under [G.L. c. 76, § 1]."[17] Under Massachusetts law, the responsibility for the education of a child rests with the town in which the child resides.[18] Application of the benefits of the textbook loan law to nonresident pupils attending private schools within a school district would be of doubtful constitutionality under the First Amendment since it would single out a specified class of citizens for special economic benefit which would not be available to nonresident pupils attending public schools.[19]

However, the textbook loan law presents a more difficult question of conformity to Article XLVI of the Amendments to the Constitution of the Commonwealth.[20] Article XLVI provides that all municipal and state moneys for support of public schools "shall be applied to, and expended in, no other schools than those which are conducted according to law, under the order and superintendence" of appropriate municipal officials, and that "no grant, appropriation or use of public money or property . . . shall be made or authorized by the commonwealth . . . for the purpose of . . . aiding any school . . . wherein any denominational doctrine is inculcated . . . ."[21] The Supreme Judicial Court has stated that the limitation on state aid in Article XLVI is "emphatic and comprehensive" and "much more specific than that of the First Amendment."[22]

Although the Supreme Judicial Court has construed Article XLVI in advisory opinions in conjunction with specific proposed bills regarding nonpublic education assistance,[23] the Court has not had occasion to discuss Article XLVI in conjunction with the "child benefit"

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[16] Acts of 1973, c. 1196, amending G.L. c. 71, § 48.

[17] Id.

[18] G.L. c. 76, §§ 1, 5, 12.

[19] Compare G.L. c. 76, § 12. See Sloan v. Lemon, 413 U.S. 825 (1973); Klinger v. Howlett, 56 Ill. 2d 1, 305 N.E.2d 129 (1973).

[20] Mass. Const. amend. art. XLVI, § 2.

[21] Id.

[22] Opinion of the Justices, 357 Mass. 836, 841-42 (1970). Constitutions of several states contain prohibitions against state aid to religion more stringent than those of the First Amendment. Furnishing textbooks to parochial school students has been held to be a forbidden use of state funds under the constitutions of several of these states. Gaffney v. State Dep't of Educ., 192 Neb. 380, 220 N.W.2d 550 (1974); Paster v. Tussey, 512 S.W.2d 97 (Mo. 1974); Dickman v. School Dist., 232 Or. 238, 366 P.2d 533 (1961), cert. denied, 371 U.S. 823 (1962). But see Borden v. Louisiana State Bd. of Educ., 168 La. 1005, 123 So. 655 (1929); Chance v. Mississippi State Textbook Rating & Purchasing Bd., 190 Miss. 453, 200 So. 706 (1941).

[23] Opinion of the Justices, 357 Mass. 836 (1970); Opinion of the Justices, 357 Mass. 846 (1970); Opinion of the Justices, 354 Mass. 779 (1968).

theory.[24] In *Quinn v. School Committee of Plymouth*[25] the Court declined to review the issue raised by the School Committee—the constitutionality of school transportation for private school students—on the ground that no personal or property right of the Committee was involved.[26] In the enactment of the textbook loan law, the General Court departed from its prior practice regarding proposed bills affording nonpublic education assistance[27] and did not submit the proposed bill to the justices for an advisory opinion.[28] The precise extent to which the prohibitions of Article XLVI may be more comprehensive than those of the First Amendment, particularly with regard to aid to parochial school students involving a basic educational tool, therefore remains defined—or more correctly, remains undefined—by the presumption of constitutionality.

As long as the benefits of the textbook loan law are not applied to nonresident pupils attending private school within a school district, the statute should withstand constitutional scrutiny. Its neutrality in relation to the Religion Clauses of the First Amendment seems clear under the Supreme Court's decision in *Board of Education v. Allen*.[29] It is not clear, however, whether the textbook loan law, if subjected to scrutiny under the prohibitions of Article XLVI of the Massachusetts Constitution, would be construed as falling without such prohibitions.

§20.6. Student rights: Rights and responsibilities of public school students. Since the recognition by the United States Supreme Court in *Tinker v. Des Moines Independent Community School District*[1] of the right of public school students to freedom of expression, lower federal and state courts have attempted to strike a balance between requirements of school discipline and student rights.[2] Post-*Tinker* cases

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[24] Prior opinions of Attorneys General have upheld benefits to parochial school students on the "child benefit" theory. Op. of the Att'y Gen. (June 13, 1966) (to Hon. Owen B. Kiernan; guidance counselor service); Op. of the Att'y Gen. (March 26, 1951) (to Hon. John J. Desmond, Jr.; lunch); Op. of the Att'y Gen. (Feb. 17, 1936) (to Hon. Charles G. Miles; transportation). But see note 22 supra.

[25] 332 Mass. 410, 125 N.E.2d 410 (1955).

[26] Id. at 413, 125 N.E.2d at 413. The Court has subsequently relaxed the requirements of standing of a school committee to raise constitutional issues in declaratory proceedings involving questions of public importance where a vista of avoidable litigation is disclosed and the issues are fully argued. School Comm. of Boston v. Board of Educ., 352 Mass. 693, 227 N.E.2d 729 (1967).

[27] See note 23 supra.

[28] The Attorney General similarly was not requested by state officers to issue an opinion with regard to the conformity of the textbook loan law to Article XLVI.

[29] 392 U.S. 236 (1968).

§20.6. [1] 393 U.S. 503 (1969).

[2] For cases originating in Massachusetts, see Riseman v. School Comm., 439 F.2d 148 (1st Cir. 1971) (Quincy school committee regulation that prohibited use of school facilities for advertising or promoting interests of any community or nonschool agency or organization without committee approval was vague and overbroad as applied to

have generally assumed the interest in attending a public school to be a liberty or property right, and have extended student rights under the First, Fourth, Fifth, Sixth, Ninth and Fourteenth Amendments to the Constitution of the United States.[3]

The rules of law which have been developing in the lower courts were addressed by the General Court in chapter 670 of the Acts of 1974.[4] The Act, which covers actual and symbolic expression,[5] dress codes,[6] and marriage, pregnancy and parenthood,[7] confirms in essence that constitutional rights of students may be limited only if there is an independent education-related reason for the limitation.

The significance of chapter 670 will undoubtedly lie in its bringing to the attention of public school officials the principles applicable to student rights which were less easily perceived through the development of case law. The Act also may be procedurally significant in providing special notice and hearing requirements with regard to promulgation of rules and regulations concerning student rights and responsibilities.[8]

Chapter 670 contains a proviso that the applicability of the Act is

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First Amendment activities of students who sought to distribute materials of a political nature); Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970) (suspension of high school student for refusal to have his hair cut violated student's Fourteenth Amendment right to personal liberty); Bishop v. Cermenaro, 355 F. Supp. 1269 (D. Mass. 1973) (vocational school hair code held constitutional); Ordway v. Hargraves, 323 F. Supp. 1155 (D. Mass. 1971)(rule requiring pregnant, unmarried high school senior to stop attending regular classes unconstitutionally limited her right to receive a public school education which is a basic personal right or liberty); Hasson v. Boothby, 318 F. Supp. 1183 (D. Mass. 1970) (students' rights under Due Process Clause were not violated by imposition of a one-year probation, subject to review, for the offense of being on school premises with beer on their breaths, even though no prior published rule forbade such conduct).

[3] For a compendium of post-*Tinker* cases, see Note, Constitutional Rights of High School Students, 23 Drake L. Rev. 403 (1974). The Supreme Court recently elaborated upon the issue of student rights. Goss v. Lopez,—U.S.—, 95 S. Ct. 729 (1975) (state is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that clause); Wood v. Strickland, —U.S.—, 95 S. Ct. 992 (1975) (holding that a school board member is not immune from liability for damages under the Civil Rights Act if he knew or reasonably should have known that the action he took within the sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student).

[4] Acts of 1974, c. 670, adding G.L. c. 71, §§ 82-86.

[5] G.L. c. 71, § 82.

[6] Id. § 83.

[7] Id. § 84.

[8] G.L. c. 71, § 85 requires notice to public school students of proposed rules and regulations and a public hearing at which students' views may be presented and taken into consideration by school officials.

dependent upon local acceptance.[9] Although local acceptance will pertain to the procedural restrictions imposed, the proviso should not be construed by public school officials to subject the constitutional rights of students to local determination.[10]

§20.7. Student rights: Student records. The right of parents and adult students to inspect records was established by the legislative action of both the General Court of Massachusetts and the United States Congress during the Survey year. Chapter 785 of the Acts of 1973 added chapter 71, section 34E of the General Laws, which provides for inspection of "academic, scholastic, or any other records concerning such pupil which are kept or are required to be kept."[1] The United States Congress enacted the Family Educational Rights and Privacy Act of 1974,[2] which provides that no federal funds will be available to any educational institution that denies parents or an adult student the right to inspect and to challenge the contents of student records.[3]

A difficulty in implementing the state law may be the interpretation of the scope of records which are kept but are not *required* to be kept. Further, unlike section 7 of chapter 4 of the General Laws[4] (the so-called Freedom of Information Act), neither the state nor federal statute contains any exemption for material, as references, which may have been inserted in a record under an assumption of confidentiality.

§20.8. Teacher personnel administration: Certification. The requirements for certification of teachers and other professional school employees under General Laws chapter 71, section 38G were amended in the Survey year.[1] Prior to the amendment of section 38G, eligibility for certification by a board of education was dependent upon requirements regarding citizenship, health, moral character, courses of study and semester hours. The 1973 amendment to section 38G establishes a two-tier system under which a provisional certificate will be issued, based on requirements similar to those previously ap-

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[9] "The provisions of [§§ 82-85] shall apply only to cities and towns which accept the same." G.L. c. 71, § 86.

[10] See Wood v. Strickland, —U.S.—, 95 S. Ct. 992 (1975).

§20.7. [1] Acts of 1973, c. 785, adding G.L. c. 71, § 34E.

[2] Act of Aug. 21, 1974, Pub. L. No. 93-380, Title V, § 513(a), 88 Stat. 571, adding 20 U.S.C. § 1232g (Supp. 1975).

[3] Id.

[4] G.L. c. 4, § 7, as amended by Acts of 1973, c. 1050.

§20.8. [1] G.L. c. 71, § 38G, as amended by Acts of 1973, c. 847. This section was further amended by Acts of 1974, c. 814, to clarify that individuals applying for certification within one year from the promulgation of rules and regulations under the Act shall be granted certification based on standards in effect prior to the effective date of the Act.

plicable to certification, for a two-year period. Permanent certification, available only to provisionally certified individuals who serve for a two-year period under the auspices of a school committee, will be dependent upon evaluation by a specially-constituted committee as to professional growth and performance. The "waiver" provision of section 38G as in effect prior to amendment, which permits a school committee to be exempt in any one school year from employing certified personnel only when compliance would in the opinion of the board constitute a great hardship in securing teachers for the schools of a town, was retained.[2]

The significance of certification in the attainment of tenure was stressed in *Luz v. School Committee of Lowell*.[3] In construing the teacher tenure provisions,[4] the Supreme Judicial Court held that a noncertified teacher hired under the "waiver" procedure of section 38G who did not thereafter achieve certification had never been lawfully employed as a teacher since he was never certified and thus was not on tenure and had no right to the procedural benefits of the teacher discharge statute.[5] Section 38G as amended goes beyond the holding in *Luz* and provides that service of an employee to whom a waiver applies shall not be counted in acquiring tenure.[6] However, the question still to be resolved is whether an individual hired under the waiver procedure under section 38G as in effect prior to amendment who thereafter achieved certification may count the noncertified portion of service in acquiring tenure. The Court's holding in *Luz* portends a negative answer since the Court equated noncertified service with not being lawfully employed as a teacher.

§20.9. Teacher personnel administration: Maternity leave. Although the issues concerning pregnancy-related disabilities are not peculiar to the field of education, a preponderance of maternity leave litigation has arisen regarding benefits and grounds for dismissal of public school teachers.[1] During the Survey year, the Supreme Judicial Court considered the constitutionality of Malden's school employee

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[2] Acts of 1973, c. 847, amending G.L. c. 71, § 38G.

[3] 1974 Mass. Adv. Sh. 1217, 313 N.E.2d 925.

[4] G.L. c. 71, § 41. The teacher tenure statute provides, in pertinent part: "Every school committee, in electing a teacher who has served in its public schools for the three previous consecutive school years, shall employ him to serve at its discretion, except as provided in [§38G] . . . ." G.L. c. 71, § 41.

[5] G.L. c. 71, § 42. The teacher was first employed under a special act regulating the employment of teachers and the school committee allowed the teacher to continue teaching under the "waiver" procedure to allow him time to meet certificate standards. 1974 Mass. Adv. Sh. at 1217, 313 N.E.2d at 925.

[6] G.L. c. 71, § 38, as amended by Acts of 1973, c. 1050.

§20.9. [1] See the companion cases of Cleveland Bd. of Educ. v. LaFleur and Cohen v. Chesterfield County School Bd., 414 U.S. 632 (1974) and cases cited therein. Id. at 638 n.8.

maternity leave regulations in *Black v. School Committee of Malden*.[2] The decision in *Black* came between two related decisions of the United States Supreme Court, *Cleveland Board of Education v. LaFleur*[3] and *Geduldig v. Aiello*.[4]

In *LaFleur*, mandatory maternity leave rules were challenged by pregnant public school teachers. The Supreme Court invalidated, as unwarranted irrebuttable presumptions violative of due process,[5] two mandatory leave rules requiring termination of employment at arbitrary points during pregnancy[6] and a rule imposing a three-month waiting period after birth prior to return to work.[7] In a concurring opinion, Justice Powell disagreed with the Court's application of the "irrebuttable presumption" doctrine, finding instead that the regulations in question violated equal protection standards since the classifications embodied in them were "either counterproductive or irrationally overinclusive . . . ."[8]

The Supreme Judicial Court in *Black* discussed both the due process and equal protection theories, noting that the latter had been the basis of decision in "[n]early all the opinions of State and lower Federal courts considering this question and finding similar rules unconstitutional . . . ."[9] The Court did not expressly favor either theory, holding:

> Whichever may be the sounder ground of constitutional decision, there can now be little doubt that the rule of the Malden school

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[2] 1974 Mass. Adv. Sh. 637, 310 N.E.2d 330. *Black* was decided with a companion case, Lane v. School Comm. of Malden. The relevant Malden regulations provided:

> *a.* No married woman employee of the Public School shall be permitted to teach or perform her duties after the end of the fourth month of pregnancy but must resign from her position.
>
> *b.* Any employee who has had to resign for maternity reasons may be eligible for reinstatement six months after the date of birth of the child . . . .

Id. at 639 n.3, 310 N.E.2d at 333 n.3.

[3] 414 U.S. 632 (1974). *LaFleur* was decided with a companion case, Cohen v. Chesterfield County School Bd.

[4] 417 U.S. 484 (1974).

[5] " '[P]ermanent irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments.' " 414 U.S. at 644, quoting Vlandis v. Kline, 412 U.S. 441, 446 (1973). See also Stanley v. Illinois, 405 U.S. 645, 654 (1972).

[6] The Cleveland rule in *LaFleur* required termination not less than five months before the expected date of birth; the Chesterfield County rule required termination at least four months prior to the expected date of birth. 414 U.S. at 635 n.1, 637 n.5. The Supreme Court left open the question whether maternity leave regulations requiring termination at a firm date during the last weeks of pregnancy might be justified. Id. at 647 n.13.

[7] Only the Cleveland rule was invalidated. The Chesterfield County rule had no such arbitrary waiting period; it simply required submission of a medical certificate from the teacher's physician. 414 U.S. at 650.

[8] 414 U.S. at 653 (concurring opinion).

[9] 1974 Mass. Adv. Sh. at 648, 310 N.E.2d at 338.

committee must be held invalid at both ends—in its provision for mandatory "resignation" by the fourth month of pregnancy, and in its provision for a six-month waiting period after birth before reinstatement is possible.[10]

The Supreme Judicial Court went beyond *LaFleur*, however, in holding that a teacher absent from work because of pregnancy-related disabilities could not be accorded different rights to sick pay than a teacher suffering from other temporary physical disabilities.[11] The Court found such a distinction to be "arbitrary and unconstitutional, whether or not one relates it to discrimination based exclusively on sex" and an invidious classification since it placed a burden on the "fundamental freedom of choice in marriage and family life."[12] The Court expressly noted, however, that it was not "intimating that no State interests can ever conceivably be asserted to justify particular distinctions for purposes of sick leave between pregnancy and other disabilities."[13]

Following the decision in *Black*, the United States Supreme Court held in *Geduldig v. Aiello*[14] that disability insurance benefits were interests of such a nature. The Court held valid a California disability insurance program that excluded from its definition of "disability" certain disabilities resulting from pregnancy.[15] Emphasizing the limited nature of disabling conditions compensable under the program,[16] the Court noted that "consistently with the Equal Protection Clause, a State 'may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind . . . ,' "[17] without a court imposing its judgment as to the appropriate stopping point as long as the line drawn by the state is rationally supportable.[18] Thus the Supreme Court found that exclusion of pregnancy from compensable disabilities was not a gender-based discrimination;[19] the state's interests in managing a self-supporting in-

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[10] Id.

[11] Id. at 649-50, 310 N.E.2d at 338-39.

[12] Id., 310 N.E.2d at 339. Although the Supreme Judicial Court found the classification to be invidious since it placed a burden on a fundamental freedom, equal protection strict scrutiny may be based either on invidious classification or on burdensome effect on a fundamental interest. See generally Gunther, The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1 (1972); Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065 (1969).

[13] 1974 Mass. Adv. Sh. at 650, 310 N.E.2d at 339.

[14] 417 U.S. 484 (1974).

[15] Id. at 486.

[16] Id. at 488-89.

[17] Id. at 495.

[18] Id.

[19] Id. at 496 n.20.

surance program which would not unduly burden participating employees were legitimate, and the exclusion of pregnancy from compensable disabilities was rationally related to such interests.[20]

The United States Supreme Court has thus far avoided definitive resolution of the standard of review applicable to sex discrimination cases. The Court has not declared gender to be a suspect classification.[21] Nevertheless, in invalidating programs while conceding the legitimacy of state objectives and a rational connection to such objectives, the Court has often appeared to apply a standard of scrutiny more strict than the deference of traditional equal protection[22] or to employ the irrebuttable presumption doctrine as an adaption of the rigorous equal protection scrutiny.[23]

The decision in *Black* confirms the principle, effected prior to 1974 through administrative regulations of the Equal Employment Opportunity Commission[24] and the Massachusetts Commission Against Discrimination,[25] that maternity leave must be treated similarly as leave for any other temporary disability. The uncertainty of the standard of review applied in gender discrimination cases by the United States Supreme Court, however, has made it more difficult for state courts to know which standard of review to apply. After *Aiello*, for example, there is a serious question of whether the Supreme Judicial Court's holding in *Black* with respect to sick pay remains good law. If, as the Supreme Court held in *Aiello*, no unconstitutional gender-based discrimination resulted from California's exclusion of pregnancy from disability benefits, why should any such discrimination result from a similar exclusion in Malden's sick leave rules? Possible justification for sustaining this aspect of the *Black* holding, even after *Aiello*, is that the Malden sick leave rules contained none of the types of explicit limitations on eligibility for benefits contained in the California program; thus there was no rational justification for excluding pregnancy under the Malden rules. *Aiello* also involved a delimited insurance fund in which the state had interests, not applicable to the sick leave limitation

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[20] Id. at 496.

[21] But see Geduldig v. Aiello, 417 U.S. 484, 497 (1974) (Brennan, J., dissenting); Kahn v. Shevin, 416 U.S. 351, 357 (1974) (Brennan, J., dissenting); Frontiero v. Richardson, 411 U.S. 677, 682-86 (1973) (plurality opinion).

[22] See Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971).

[23] See Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 651 (1974) (Powell, J., concurring).

[24] 29 C.F.R. § 1604.10(b) (1974), promulgated pursuant to 42 U.S.C. §§ 2000e-2000e(15) (1974), as made applicable to state agencies and educational institutions by Pub. L. No. 92-261, 86 Stat. 103 (March 24, 1972).

[25] Regulations promulgated in 1973 by the Massachusetts Commission Against Discrimination pursuant to G.L. c. 149, § 105D; c. 151B, § 4, as inserted by Acts of 1972, c. 790.

of *Black*, that the employee contributions not be raised, that benefits not be trivialized, and that the specific program remain self-supporting. Although providing sick leave benefits to pregnant teachers is costly to a school system, such generalized fiscal concern is not sufficient state interest to exclude pregnancy.

§20.10. Teacher personnel administration: Procedural safeguards for tenured teachers. In *Black v. School Committee of Malden*,[1] the Supreme Judicial Court held that the school committee's unilateral terminations of employment of two pregnant, tenured teachers were not acts of "dismissal" within section 42 of chapter 71 of the General Laws and thus did not require notice, hearing, and other procedural safeguards of that statute.[2] The Court found that the terminations were "forced resignations," a "final though belated decision by the school committee" to enforce its mandatory maternity leave rule which included a reinstatement provision.[3]

In holding that section 42 was inapplicable, the Court also noted that the terminated teachers did not claim that the school committee's acts were "suspensions" within section 42D of chapter 71 of the General Laws, which also provides for notice, hearing and other procedural safeguards.[4] Without the protection of section 42, the Court recognized that the teachers would have to wait for reinstatement for six months or longer after childbirth and would not have the opportunity for a hearing in which they could have argued for a revision of the rule.[5]

If the contention that "terminations" with eligibility for reinstatement were "suspensions" had been properly advanced and rejected, a category of "forced resignations" would have been created which would eliminate the necessity for suspension of an employee for not complying with a regulation requiring resignation or leave of absence. Since the impact of forced resignation would seem to be as adverse as that of suspension, it would be anomalous if the procedural safeguards applicable to dismissal or suspension were not available to individuals in the position of plaintiffs in *Black*. However, future plaintiffs may successfully contend that "forced resignations" are "suspensions" within section 42D, or at least that they have a due process right to some kind of hearing.[6]

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§20.10. [1] 1974 Mass. Adv. Sh. 637, 310 N.E.2d 330. For a discussion of the constitutional issues raised in *Black*, see § 20.9 supra.

[2] 1974 Mass. Adv. Sh. at 643-44, 310 N.E.2d at 335-36.

[3] Id. at 643, 310 N.E.2d at 335. See § 20.7 n.2 supra.

[4] 1974 Mass. Adv. Sh. at 645 n.12, 310 N.E.2d at 336 n.12.

[5] Id. at 644-45, 310 N.E.2d at 336.

[6] Although the plaintiffs in *Black* failed to do so, the Court inferentially pointed out that plaintiffs could assert constitutional rights of hearings if their pleadings included a statement of the requisite interest to invoke procedural due process protection. Id. at 645 n.12, 310 N.E.2d at 336 n.12, citing Board of Regents of State Colleges v. Roth,

§20.11. Teacher personnel administration: Dismissal. In *Wishart v. McDonald,*[1] the United States Court of Appeals for the First Circuit held: (1) a dismissed tenured sixth-grade teacher was not required to exhaust state remedies[2] before coming into federal court alleging deprivation of constitutional rights;[3] (2) a dismissal of a teacher for carrying, in public view on his property located in the town where he taught, in a lewd and suggestive manner, a dress mannequin that he had dressed, undressed and caressed, was not arbitrary or capricious;[4] and (3) the statutory standard of "conduct unbecoming a teacher" was not unconstitutionally vague.[5]

The significance of *Wishart* lies in the great deference the court was willing to accord the school committee's decision that a teacher's conduct which occurred outside the school environment on his private property was sufficiently job-related to justify their action of dismissal. In finding that the dismissal was not arbitrary or capricious, the court stated that although the view that the conduct "would destroy [the teacher's] ability to serve as a role-model for young children"[6] may be overly strict, it is just such a judgment that a school committee is elected to make and should prevail unless plainly wrong.[7] Further, the statutory standard of "conduct unbecoming a teacher" applied by the school committee was not vague as to plaintiff since his behavior "was sufficiently odd and suggestive that the ordinary person would know, in advance, that his image as an elementary school teacher would be

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408 U.S. 564, 574 (1972) ("liberty" and "property" interests of the Fourteenth Amendment include "the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men," quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)), and Perry v. Sindermann, 408 U.S. 593 (1972) (professor whose contract was not renewed was entitled to procedural due process protection, including hearing and notice of grounds of his nonretention, if college had a de facto tenure program and professor had tenure under that program).

§20.11. [1] 500 F.2d 1110 (1st Cir. 1974), aff'g 367 F. Supp. 530 (D. Mass. 1973).

[2] A tenured teacher dismissed under G.L. c. 71, § 42, is entitled to a de novo hearing in superior court and the right of appeal. G.L. c. 71, § 43A.

[3] 500 F.2d at 1114-15.

[4] Id. at 1115-16. The court applied the three-pronged analysis established in Drown v. Portsmouth School Dist., 451 F.2d 1105 (1st Cir. 1971) (dismissal could be "arbitrary and capricious" if reason were "trivial," if "wholly unsupported by facts," or if "unrelated to the educational process or to [the] working relationships within the educational institution").

[5] 500 F.2d at 1116. The court found the vagueness challenge foreclosed by Arnett v. Kennedy, 416 U.S. 134 (1974) (standard for federal employees of "such cause as will promote the efficiency of the service" held not unconstitutionally vague).

[6] 500 F.2d at 1115.

[7] Id. at 1116.

gravely jeopardized."[8] The court stated that if the cause for dismissal were speech or some other constitutionally protected activity, its conclusions as to arbitrariness of dismissal and vagueness of standard would have been different.[9]

§20.12 School governance: Boston School Committee discretion as to budgetary decision. The Supreme Judicial Court in *Pirrone v. City of Boston*[1] held that a statutory "ten taxpayer bill,"[2] brought to obtain a determination that insufficient funds had been appropriated for the support of public schools, could not be maintained against the city of Boston.[3] The Court found that such a suit would be irreconcilable with the comprehensive statutory system applicable to school finances in Boston limiting the budgetary autonomy of the Boston School Committee.[4] The Court found it clear that the legislature "intended that the Boston school committee should have less budgetary autonomy than school committees in other Massachusetts cities and towns."[5]

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[8] Id.

[9] Id. at 1116 & n.5.

§20.12. [1] 1973 Mass. Adv. Sh. 1565, 305 N.E.2d 96.

[2] G.L. c. 71, § 34 provides in pertinent part:

> Upon petition to the Superior Court . . . against a city or town, brought by ten or more taxable inhabitants thereof, . . . alleging that the amount necessary . . . for the support of public schools . . . has not been included in the annual budget appropriations . . ., said court may determine the amount of the deficiency, if any, and may order such city . . . to provide a sum of money equal to such deficiency, together with a sum equal to twenty-five percent thereof.

[3] 1973 Mass. Adv. Sh. at 1575, 305 N.E.2d at 103.

[4] Id. The statute currently applicable cited by the Court is Acts of 1936, c. 224, as amended.

[5] 1973 Mass. Adv. Sh. at 1574, 305 N.E.2d at 102. Unlike other cities and towns within the Commonwealth, which are required by G.L. c. 71, § 34 to appropriate *all* the funds requested by their school committees for necessary school purposes, the Boston School Committee's school expenditures are limited by fixed dollar amounts which can be increased only after request by the school committee to the mayor, recommendation by the mayor to the city council, and approval by the city council, subject to the mayor's veto. 1973 Mass. Adv. Sh. at 1571-74, 305 N.E.2d at 101-03.